

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

DAVID BALDUS PHILLIPS,

Petitioner,

vs.

JACK PALMER, et al.,

Respondents.

Case No. 3:09-CV-00377-RCJ-(VPC)

ORDER

The court determined that petitioner did not exhaust his state-court remedies for ground 4 of the petition (#9), and the court directed petitioner to decide what to do with that unexhausted ground. Order (#37). Petitioner has submitted a Rule 60(b) motion (#38), which the court construes as a motion to reconsider its earlier order (#37) because the court has not entered a final judgment. Respondents have submitted an opposition (#39). The court finds that reconsideration is not warranted, and the court denies the motion (#38).

The court is not persuaded by petitioner's argument that the court should consider ground 4 exhausted because he cited federal-court opinions in his state-court briefs. As the court explained in its order (#37), and as respondents argue in their opposition (#39), citation of a federal-court opinion does not necessarily present an issue of federal constitutional law to the state courts. Ground 4 is a claim that the state-court remedy for deprivation of a direct appeal—raising direct-appeal issues in a state post-conviction habeas corpus petition, with the right to appointed counsel—is a constitutionally inadequate substitute for a direct appeal. See Lozada v. State, 871 P.2d 944 (Nev. 1994). As the court noted, the opinions that petitioner cited in state court in support

1 of his claim did not decide issues of constitutional law. Those opinions interpreted the Federal
2 Rules of Criminal Procedure, which do not apply to state-court criminal proceedings, and they
3 determined that the remedy for a deprived direct appeal was to vacate and re-enter the judgment of
4 conviction, thus allowing a direct appeal. In none of those opinions did the courts of appeals hold
5 that the federal constitution required this procedure; the courts of appeal were acting as supervisors
6 over federal criminal cases.

7 The court is also not persuaded by the opinions that petitioner cited in his state-court
8 opening brief that did mention constitutional law. Petitioner cited Douglas v. California, 372 U.S.
9 353 (1963), for the proposition that the Sixth Amendment right to counsel extends to a direct appeal
10 from a judgment of conviction. Petitioner cited Anders v. California, 386 U.S. 738 (1967), for the
11 proposition that the Sixth Amendment requires counsel to file the appeal and to identify possible
12 issues even though counsel does not believe that those issues have a reasonable probability of
13 success. See Ex. 234, pp. 10-11 (#34). Neither of these two Supreme Court opinions hold that the
14 federal constitution requires a particular procedure when counsel deprives a defendant of a direct
15 appeal.

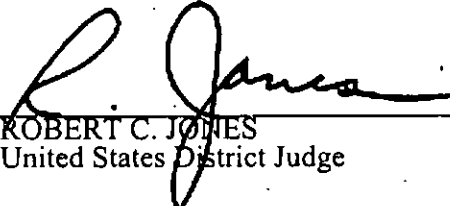
16 Finally, the court is not persuaded by Petitioner's argument that he cited Roe v.
17 Flores-Ortega, 528 U.S. 470 (2000), in his state-court reply brief. See Ex. 237, p. 3 (#24). To the
18 extent that petitioner was trying to raise a federal constitutional issue, Nevada does not allow the
19 raising of new issues in reply briefs. Thomas v. State, 148 P.3d 727, 735 & n.21 (Nev. 2006) (citing
20 Nev. R. App. P. 28(c)); Browning v. State, 91 P.3d 39, 54 (Nev. 2004) (same); Leonard v. State,
21 958 P.2d 1220, 1237 (Nev. 1998) (same). A procedurally incorrect method of raising an issue
22 before a state court does not exhaust that issue. See Castille v. Peoples, 489 U.S. 346, 351 (1989).

23 IT IS THEREFORE ORDERED that petitioner's Rule 60(b) motion (#38) is
24 **DENIED.**

25 IT IS FURTHER ORDERED that petitioner shall have thirty (30) days from the date
26 of entry of this order to do one of the following: (1) inform this court in a sworn declaration that he
27 wishes to dismiss ground 4 of his petition (#9), and proceed only on the remaining grounds for
28 relief, (2) inform this court in a sworn declaration that he wishes to dismiss his petition (#9) to

1 return to state court to exhaust his state remedies with respect to the claims set out in ground 4 of his
2 petition (#9), or (3) move to stay this action while he returns to state court to exhaust his state
3 remedies with respect to the claims set out in ground 4 of his petition (#9). Failure to comply will
4 result in the dismissal of this action.

5 Dated: December 28, 2010

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8 ROBERT C. JONES
9 United States District Judge
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